

SYMPOSIUM ON INVESTOR RESPONSIBILITY: THE NEXT FRONTIER IN INTERNATIONAL INVESTMENT LAW

THE CREATION OF ELUSIVE INVESTOR RESPONSIBILITY

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The issue of investor responsibility reveals a stubborn bias within international investment law. That law addresses mistreatment by host states of foreign investors but consistently fails to address investor misconduct in host states. The traditional emphasis on state responsibility in this context has allowed abusive, pollutive, and corrupt investor behavior to thrive. International investment law is the current object of scrutiny, criticism, and reform in large part because many see it as overprotecting investors.¹ However, scholars and reformers have focused on state responsibility, tinkering with the legal and institutional conditions that determine the international wrongfulness of state conduct. Unless and until investor responsibility is integrated into international investment law reform, the overprotection of investors owing to an accountability gap will continue to undermine its legitimacy. This essay posits that the first step to integration is understanding why investor responsibility scrabbles to find purchase in international investment law. I argue that elusive investor responsibility was created by omission, with injurious consequences that highlight the need to alter, rather than accept, the status quo.

Creation by Omission from Nuremberg to Rome and Beyond

International investment law creates obligations requiring states to protect private investors.² Investors benefit from the international minimum standard of treatment that obliges host states to accord foreign investors core guarantees such as freedom from arbitrary treatment and access to effective remedy for injury suffered.³ Investors are also protected from the expropriation of their investments without compensation, public purpose, or due process.⁴ In contrast, private wrongdoing in host states invites the application and sanction of domestic law, not of international law. The protective shield that international law casts over private entities was first dented after World War II. The International Military Tribunal at Nuremberg convicted Nazi leaders for the commission of war crimes, recognizing that individual conduct can violate and be punished by international law. Major German corporations facilitating and financing Nazi atrocities also attracted prosecutorial interest, but charges were never brought. As there was no precedent on corporate misconduct violating international law, it would have been

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¹ United Nations Comm'n on International Trade Law Working Group III, [Investor-State Dispute Settlement](#) (2017 to present).

² Edwin M. Borchard, [Theoretical Aspects of the International Responsibility of States](#), 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES REICHT UND VÖLKERRECHT 223, 247 (1929).

³ [L.F.H. Neer and Pauline Neer](#) (U.S. v. Mex.), IV R.I.A.A. 60, 61–62 (1926).

⁴ Alexander P. Fachiri, [International Law and the Property of Aliens](#), 10 BRIT. Y.B. INT'L L. 32, 51 (1929).

more expedient for the Allies to obtain wartime reparations by seizing corporate assets instead of waiting for a novel indictment to run its course.⁵

Decades later and in an echo of Nuremberg, the prospect of prosecuting corporations for international crimes did not materialize in the Rome Statute of the International Criminal Court. In order to encourage ratification of the Rome Statute, its drafters deemed it more expedient to focus on criminalizing individual conduct instead of waiting for a consensus on the underdeveloped concept of criminalizing corporate conduct.⁶

This historical gap in legally binding private actor responsibility under international law⁷ spread well beyond international criminal law. The period between Nuremberg (1945) and Rome (1998) saw the conclusion of thousands of bilateral and multilateral treaties recording the obligations of host contracting states to protect investments belonging to nationals of other contracting states. The latter part of this period also saw the rise and dominance of corporations as foreign investors.⁸ First generation investment treaties clearly reflect the desire of contracting states for corporate investor protection, but it is far from clear if corporate investor accountability was omitted from these treaties by design, in the vein of Nuremberg and Rome, or by inadvertence.⁹ Whatever the case may be, investment treaties enlarge the class of unaccountable investors and reinforce their unaccountability.

Class enlargement is achieved by the equal application of treaty protection to both corporate and individual investors. The recognition of individual international responsibility after Nuremberg and Rome excludes individuals from the categorical protection of international law, leaving corporations within that historical, protective ambit. As investment treaties promise protection without distinguishing individual from corporate investors, they backtrack on the progress made in Nuremberg and Rome, returning to the historical position where all private entities, corporate *and* individual, are the protected and all states are the protectors. That said, investment treaties do not preclude the prosecution of individual investors under the Rome Statute. Lack of investor accountability is reinforced by asymmetrical dispute settlement provisions that allow investors to bring claims in arbitration directly against states for treaty violations, but not vice versa. The asymmetry is stark when the impugned state measure addresses actual or arguably wrongful investor conduct under general international law. By supplying only investors with defined means to enforce international obligations against states, investment treaties espouse the anomaly where investors can demand redress despite their own misconduct,¹⁰ while states appear conditioned to forego pursuit of investor responsibility.

The Entrenchment of Elusiveness by States

States facing claims for investment treaty violations rarely bring counterclaims for investor violations of international law. If states bring counterclaims at all,¹¹ they are more likely to allege investor violations of domestic law. Ecuador's reference to "the claimant's own international illegality" for human rights violations without

⁵ Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1118, 1247–48 (2009).

⁶ David Scheffer, *Corporate Criminal Liability Under the Rome Statute*, 57 HARV. INT'L L.J. ONLINE 35, 38 (2016).

⁷ MARKOS KARAVIAS, *CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW* (2013). See also Silvia Steininger & Jochen von Bernstorff, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate 'Human Rights' in International Law* (Max Planck Institute for Comparative & International Law Research Paper No. 2018–25, 2018).

⁸ UNCTAD, *World Investment Report 1992 – Transnational Corporations as Engines of Growth* 59–64.

⁹ Lauge Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65(2) WORLD POLIT. 273, 280, 296 (2013).

¹⁰ Cf. *Metal-Tech v. Uzb.*, ICSID Case No. ARB/10/3, Award paras. 278–374 (Oct. 4, 2013).

¹¹ See, e.g., *Convention for the Settlement of Investment Disputes Between States and Nationals of Other States* art. 46, 575 UNTS 159.

counterclaiming or pressing for a ruling on the same in *Copper Mesa Mining Corporation v. Ecuador*¹² suggests ambivalence towards the prospect and purpose of recognizing investor responsibility. In contrast, Ecuador has succeeded in demonstrating investor liability for damages under Ecuadorian environmental law in *Perenco Ecuador Limited v. Ecuador*¹³ and *Burlington Resources Inc v. Ecuador*.¹⁴ Respondent states are more likely to favor a safe course of action over a speculative one. But routinely reframing potentially internationally wrongful investor conduct as a violation of domestic law is problematic for two reasons. First, it hampers legal development by suppressing arbitrators' ability to consider and confirm existing and emerging international obligations by which investors are bound. In a classic Catch-22 scenario, international investment law cannot evolve to address investor responsibility if opportunities to do so are passed over. Second, by downgrading an international wrong into a domestic or minor infraction, it belittles the impact on future investor conduct of a ruling finding investor responsibility. Errant investors are more likely to heed stern pronouncements on "grave allegations against the Claimant of violations of international law" rather than lenient remarks by a tribunal about "a sustained act of folly."¹⁵

One state that recently bucked the trend of sidestepping investor responsibility when bringing counterclaims is Argentina. In *Urbaser S.A. & Anor v. Argentina*, Argentina sought a ruling on whether a water concessionaire was "bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services."¹⁶ This landmark counterclaim highlights the symbiotic relationship between respondent states and arbitral tribunals that affects the integration of investor responsibility into international investment law.

The Complementary Entrenchment of Elusiveness by Tribunals

Awards rendered by arbitral tribunals constituted under treaty or contract to hear disputes between investors and states are an important source of international investment law.¹⁷ Before arbitral tribunals can foster acceptance of investor responsibility as part of international investment law, however, respondent states must enable tribunals to do so by requesting a ruling on investor responsibility. The *Copper Mesa* tribunal received proof of severe investor misconduct, but no prayer from Ecuador to rule on investor responsibility. Unwilling to overlook episodes of violence inflicted on villagers by the investor's employees, yet unauthorized to hold the investor responsible for wrongdoing, the tribunal reached a middle ground. Relying on Article 39 of the International Law Commission's Articles on State Responsibility, the *Copper Mesa* tribunal held that the investor contributed to its own injury, justifying a reduction in the amount of compensation payable by Ecuador for expropriating the investor's mining concessions.¹⁸

Article 39 may have enabled the *Copper Mesa* tribunal to put a price on investor misconduct, but its invocation misrepresents what is at stake. Article 39 envisages a reduction in reparation payable by the injuring state when the victim has contributed to its own injury by conducting itself in a manner that was "wilful or negligent." Article 39 is only concerned with acts and omissions "which manifest a lack of due care on the part of the victim of the breach

¹² [Copper Mesa Mining v. Ecuador](#), PCA Case No. 2012–2, Award paras. 5.4, 5.39, 5.42 (UNCITRAL-Mar. 15, 2016) (redacted).

¹³ [Perenco Ecuador v. Ecuador](#), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim paras. 34–42, 611 (Aug. 11, 2015).

¹⁴ [Burlington Resources v. Ecuador](#), ICSID Case No. ARB/08/5, Decision on Counterclaims paras. 52, 79–117, 1075, 1099 (Feb. 7, 2017).

¹⁵ [Copper Mesa Mining v. Ecuador](#), PCA Case No. 2012–2, Award paras. 5.42, 6.99 (UNCITRAL-Mar. 15, 2016) (redacted).

¹⁶ [Urbaser v. Arg.](#), ICSID Case No. ARB/07/26, Award para. 1206 (Dec. 8, 2016).

¹⁷ JEAN HO, [STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS](#) 63–72 (2018).

¹⁸ [Copper Mesa Mining v. Ecuador](#), PCA Case No. 2012–2, Award paras. 5.65, 6.102, 7.30 (UNCITRAL-Mar. 15, 2016) (redacted).

for his or her own property or rights,”¹⁹ and not the victim’s internationally wrongful conduct. States potentially forego more than a ruling on investor responsibility by not requesting one. Ecuador relinquished stewardship over the characterization of Copper Mesa’s conduct as internationally wrongful, acquiescing in the tribunal’s erroneous invocation of Article 39, and in the ensuing lesser label of contributory negligence.

Unlike the *Copper Mesa* tribunal, the *Urbaser* tribunal was able to rule on investor responsibility because Argentina brought a counterclaim on this very issue. It held that although the investor’s failure to provide essential potable water and sewage services violated the concession awarded by the Province of Buenos Aires, there was no violation of international law. The tribunal noted that no obligation guaranteeing the human right to water was imposed on the investor by the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, or the International Labour Office’s Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy.²⁰ Perhaps mindful of a possible backlash against the dismissal of Argentina’s landmark counterclaim representing an ideological shift away from investor overprotection, the *Urbaser* tribunal astutely confined its decision to the present facts. Observing that “[t]he situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake” because “[s]uch an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties,” the tribunal accepted that investor responsibility attaches whenever an investor violates a determinate and binding international obligation.²¹

By raising the issue of investor responsibility and requesting a ruling on it, states empower arbitral tribunals to consider, critique, and validate the legal bases on which investor responsibility can be established. In turn, by formally acknowledging the viability of pursuing investor responsibility, arbitral tribunals enable more states to explore, advocate, and formally adopt international obligations applicable to investors. Unlike what the blanket rejection of investor-state arbitration by some states and the redirection of future investor claims to domestic courts implies, the relationship between states and arbitral tribunals need not be antagonistic. *Urbaser v. Argentina* displays early signs that together, states and arbitral tribunals can correct the bias in favor of investors by turning investor responsibility into a fixture of international investment law.

The Further Entrenchment of Elusiveness in Corporate Social Responsibility

At present, investor responsibility is elusive because states rarely file counterclaims for and tribunals seldom rule on investor responsibility. This elusiveness is further entrenched by the corporate social responsibility movement, which advocates corporate self-regulation (CSR).²² When corporate investors, whether motivated by profit or civic duty, voluntarily adopt sustainable and lawful business practices, the pursuit of investor responsibility in international fora becomes redundant. To be fair to its proponents, the CSR movement has made some headway in Europe. Starting from 2018, large public interest corporations are required by law to report their policies on various aspects of social responsibility, such as environmental protection and human rights preservation.²³ However, until the European model of imposing mandatory CSR reporting only on the largest corporations converts all corporations into socially responsible actors, the Achilles heel of the CSR movement is voluntary compliance

¹⁹ Int’l Law Comm’n, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#), UN Doc. A/56/10 at 31, 110 (2001).

²⁰ [Urbaser v. Arg.](#), ICSID Case No. ARB/07/26, Award paras. 1196–99 (Dec. 8, 2016).

²¹ *Id.* at para. 1210.

²² Ilias Bantekas, [Corporate Social Responsibility in International Law](#), 22 B.U. INT’L L.J. 309, 317–25 (2004).

²³ [Council Directive 2014/95/EU Amending Council Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups](#), 2014 O.J. (L 330) 1.

with a given code of best business practices.²⁴ The key CSR instruments—the UN Global Compact and the UN Guiding Principles on Business and Human Rights—exhort but do not penalize departures from socially responsible corporate conduct. It is therefore unsurprising that the CSR movement does not beget socially responsible corporate investors.²⁵

Some, like Dutch conglomerate Royal Dutch Shell, profess commitment to CSR while practicing noncompliance. Although Shell has been a signatory to the UN Global Compact since 2000, its activities in Nigeria dating back to the 1990s have attracted several lawsuits,²⁶ including a pending claim in the United Kingdom brought by inhabitants of Ogoniland for environmental damage caused by oil spills.²⁷ In 2011, the United Nations Environment Programme (UNEP) studied and documented the alarming extent of the pollution by Shell.²⁸ Shell accepted the UNEP's findings but did nothing to reverse the damage. An investor that takes its pledge to the UN Global Compact seriously would have offered to clean up the oil spills, sparing the local community from litigating their grievance in a foreign jurisdiction, or before a subregional court.²⁹

Others, like Australian firm Anvil Mining, take no apparent interest in CSR. In 2004, government forces of the Democratic Republic of Congo (DRC), with logistical support from Anvil Mining, massacred scores of civilians in the name of exterminating rebel forces.³⁰ When asked in a radio interview about Anvil Mining's complicity in the massacre, its CEO Bill Turner expressed no remorse over the bloodshed, adding that "you don't do those things if you don't want to get shot at."³¹ To date, no claims or charges have been brought against Anvil Mining by the next-of-kin of the massacred; by its host state, the DRC; or by its home state, Australia. By fixating on the narrow ideal of socially responsible investors, the CSR movement dodges the broader reality of persistent investor misconduct. In the DRC, the heavy mantle of correcting investor misconduct appears to have fallen on local activists. #StandWithCongo is a social media movement that spotlights socially irresponsible investors in the DRC. It remains to be seen if named and shamed investors, such as Japanese gaming giant Nintendo (which reportedly sourced minerals from conflict zones),³² value their social media image enough to do more than pay lip-service to CSR.

Conclusion

The suppression of investor responsibility by a combination of historical circumstance and prolonged treaty silence has precipitated recourse to less effective substitutes and solutions for redressing investor misconduct. Replacing a counterclaim for investor responsibility with a counterclaim for a domestic law infraction harms states by preserving international investment law as a sanctuary for errant investors. Replacing a ruling on investor responsibility with a ruling on investor contributory negligence impedes the coherent development of international law by encouraging the mischaracterization of internationally wrongful conduct as negligence. Replacing

²⁴ Cf. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127, 134 (2010).

²⁵ [Complete List of Cases Profiled – Lawsuits Against Companies](#), BUSINESS & HUMAN RIGHTS RESOURCE CENTRE.

²⁶ Most notably, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

²⁷ *HRH Emere Godwin Bebe Okpabi v. Royal Dutch Shell* [2018] EWCA Civ 191 (UK).

²⁸ UN Env't Programme, *Environmental Assessment of Ogoniland* (2011).

²⁹ Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AJIL 737, 767 (2013).

³⁰ Mission de l'Organisation des Nations Unies en République Démocratique du Congo (MONUC), [Report of the Special Investigation into allegations of summary executions and other human rights violations by FARDC in Kilwa \(Katanga Province\)](#) (2004).

³¹ *The Kilwa Incident Transcript (testimony of Bill Turner)*, AUSTRALIAN BROADCASTING CORPORATION (2005).

³² Hayley Tsukayama, *Nintendo Faces Questions over "Conflict Mineral" Policy*, WASH. POST (June 19, 2013).

the pursuit of investor responsibility with voluntary CSR compliance undermines the rule of law by insisting on self-regulation when investors are simply unable or unwilling to self-regulate. It is hoped that ongoing negotiations at the United Nations Human Rights Council “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,”³³ will inspire further initiatives to recognize investor responsibility. The integration of investor responsibility into investment treaties, the bringing of counterclaims for investor responsibility in investor-state arbitration, and the bringing of claims for investor responsibility in domestic courts are all steps in the right direction.

³³ Human Rights Council, [Resolution 26/9](#), UN Doc. A/HRC/26/L.22/Rev.1 (June 24, 2014).